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Second Amendment Symposium: Commentary

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COMMENTARY

*Randy Barnett**

First I want to thank all of you for having stayed for so long. I saw a lot of people leave but those of you who stayed, I think have stayed pretty much the whole time. That's quite extraordinary. As for the Second Amendment, I'm on the individual rights side of the issue. I'm not going to go through all the reasons, but just provide a basic sort of the thumbnail sketch of the Second Amendment.

There is just no reason to believe—literally no reason to believe—that the word “people” in the Second Amendment meant something different than it means in the First Amendment where it protects an individual right or in the Fifth Amendment or the Ninth Amendment. In fact, the existing evidence suggests that it means exactly the same thing in the Second Amendment as elsewhere. I want also to point out that the Second Amendment applies to the Federal Government. That is the reason it comes up in the context of the *Emerson* case. There is some controversy about whether it was meant to apply only to the Federal Government. But the weight of the evidence suggests the Second Amendment like the rest of the Bill of Rights, originally imposed restrictions only on the Federal Government as was held in *Barron v. Baltimore*.

With respect to the state governments, you have to look at the Fourteenth Amendment as Mr. Halbrook has already explained to us. The Fourteenth Amendment has the phrase, “no state shall make any law abridging the privileges or immunities of citizenship” and there is overwhelming evidence that among the privileges and immunities of citizenship intended to be protected by that clause was the right to keep and bear arms. Therefore, if you're considering a state law, it is a Fourteenth Amendment question and you really ought to be talking about privileges or immunities. We would be talking about that were it not for the *Slaughter House* cases which called that provision into doubt. However, there is no doubt that, of all the rights in the Bill of Rights that were thought to be incorporated into the Fourteenth Amendment, the right to keep and bear arms was one of the most important after the right of free speech and the right of assembly.

When gun laws are at issue, things get rather confusing rather quickly so if you're talking about a federal statute, that is a Second Amendment question. If you're talking about a state statute, then that is a Fourteenth Amendment issue. I should tell you that in the gun control debates, and you heard a fair represen-

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tation of these debates, generally speaking the people who are opposed to the idea of individual rights spend almost no time talking about the Fourteenth Amendment. Please just be aware of that fact. There is virtually nothing in the literature refuting the individual gun rights interpretation of the Fourteenth Amendment.

That is my position on the Second Amendment. Now let me say what my reaction has been to the other presentations. Assuming that you take the view that the Second Amendment protects an individual right, as I think you should, what does that mean? Where do you go from there? What is the implication of that? We have heard a parade of horrible implications coming from the gun control lobby. However, there is no one that I'm aware of who is a scholar of the Second Amendment and takes the individual rights position who believes that the individual right protected in the Second Amendment is any more absolute than the individual right protected in the First Amendment. The right of free speech is an example.

The right of free speech is a very important right, but it is not an absolute right. That is, you do not have a free speech right to commit fraud. There are time, place and manner restrictions that can be placed on the exercise of speech or on the exercise of assembly. For example, you can require a permit to hold a parade on a public street so you don't have two parades trying to march up the same street at the same time.

What does it mean to say that the First Amendment protects individual rights to free speech in light of the fact that it is not absolute? It means that any government restriction or interference with a *wrongful* exercise of speech, such as fraud or defamation, would be constitutional. If it is a regulation of a *rightful* exercise of speech, then the regulation must be a reasonable and pass a very high degree of scrutiny. It is useless to quibble over the appropriate term to be applied, but the regulation is going to have to pass a high degree of scrutiny to show that the means chosen to restrict speech are well tailored to meet a purpose that is appropriate.

Those who advocate an individual right approach to the Second Amendment take the same view. It is not that the Second Amendment protects an absolute right, but while Second Amendment rights may be regulated, any purported regulation must bear serious scrutiny of the same kind applied in the First Amendment context. And then the question is can it survive scrutiny or not.

I want to conclude by making two points, one about the *Emerson* case and one general point for those of you who are sympathetic with gun control. Let me first talk about the *Emerson* case. You already heard a bit about it. I am a signatory on one of the Amicus Briefs, which I think is an excellent work. In fact, I have recommended that the Law Review publish both Professor Yassky's brief and the Academics for the Second Amendment Brief as part of this symposium. I think they would be doing a great service if those briefs became a part of the scholarly record. The Amicus Brief that I signed does not

contend that Mr. Emerson should have a right to keep his weapons even if he is a danger to other people, his wife, or anyone else. It is simply that this statute, if interpreted the way the government wants to interpret it, does not require a judicial hearing for dangerousness. Rather, our brief and that of the Attorney General of Alabama, argued the statute should be interpreted to require a judicial finding of dangerousness before the automatic firearms disability is triggered. But the statute currently seems to say that whenever an order of protection or restraining order is issued, then automatically all weapons possessed by a person against whom such a restraining order has been issued are made illegal under Federal law. It automatically becomes a federal offence to possess any weapon if you are the subject of a restraining order. This is overly broad from the Second Amendment standpoint.

Our brief contended that what would be required to meet Second Amendment scrutiny, was a hearing to establish the dangerousness of the individual. Such a hearing did not occur in the *Emerson* case. Had evidence of all these facts we heard from Mr. Lowy—I don't know where these facts came from—been presented before a judge who then made a finding of dangerousness, at that point, it would not be a Second Amendment violation to take away Mr. Emerson's weapons. That would be what we call a "reasonable regulation" of the right to keep and bear arms, which that was consistent with its purpose.

A scenario that would be outside the boundaries of a reasonable regulation of firearms would be a complete confiscation of all guns so individuals couldn't own firearms, which is, in fact, the political agenda of many gun control advocates. Now I'm not saying everyone advocates this agenda, but it is undeniably the agenda of many gun control activists. This would be prohibited under an individual rights interpretation of the Second Amendment. But reasonable regulation is not.

What is a reasonable regulation? That is a good question, but outside of a few paradigm cases, it is not a question that can be answered in the abstract. I think Steve Halbrook and I might disagree about the definition of a reasonable regulation. I don't know if we would or not. We will probably talk about it at dinner.

I'll close by saying to those of you who are sympathetic with any kind of restrictions on firearms, you really ought to reconsider any skepticism you may have about the Second Amendment. It is the refusal to recognize the Second Amendment as an individual right on equal footing with the rights protected by the First Amendment that causes everyone who believes in gun rights to put up their back whenever a regulation of any kind is proposed. Why? Because in the absence of constitutional protection, they believe that every regulation is a stepping stone towards complete confiscation. They would not have to believe that if the Supreme Court stood up and said such confiscation is unconstitutional. Moreover, in this country, a complete ban on firearms is not going to happen. If the unconstitutionality of such a ban became the clear law of the

land, gun rights advocates would have less to fear from reasonable regulations. It isn't the law of the land and it is precisely because it is not now the law of the land that every regulation has to be opposed as a stepping stone towards confiscation.

So those of you who believe in reasonable regulation should also strongly advocate the individual right to keep and bear arms as a means to getting to reasonable regulations as a political outcome. With that, I'll close. Thank you.